

**Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

<hr/>)
<i>In re</i>)
)
ADJUSTMENT OF ROYALTY RATES)
FOR STATUTORY CABLE)
RETRANSMISSION LICENSE)
<hr/>)

NO. 15-CRB-0010-CA-S
(Sports Rule Proceeding)

**JOINT MOTION OF THE PARTICIPATING PARTIES
TO SUSPEND PROCEDURAL SCHEDULE AND TO ADOPT SETTLEMENT**

The Joint Sports Claimants (“JSC”),¹ NCTA– The Internet & Television Association (“NCTA”),² and American Cable Association (“ACA”) (collectively, the “Participating Parties”)—the only parties to this proceeding—are pleased to report that they have reached a complete settlement of the above-captioned proceeding. The Participating Parties respectfully request that the Copyright Royalty Judges (“Judges”) terminate this proceeding by adopting the proposed rule set forth in Exhibit A. They further request that the Judges suspend, pending resolution of the present motion, the procedural schedule set forth in the *Order of Bifurcation*, *Second Order of Further Proceedings*, *Notice of Participants*, and *Scheduling Order*, Docket No. 15-CRB-0010-CA-S at Exhibit B (June 22, 2016) (“June 22 Order”). That Order requires, among other things, the filing of Written Direct Statements on January 20, 2017. *Id.*

¹ The Joint Sports Claimants are the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the Women’s National Basketball Association, the National Hockey League and the National Collegiate Athletic Association.

² NCTA filed its notice of intent to participate in this proceeding (jointly with ACA) on May 26, 2016 under the name “National Cable & Telecommunications Association.” Subsequent to the initial filing, NCTA changed its name to “NCTA–The Internet & Television Association.”

I. BACKGROUND

Section 111(d)(1)(B) of the Copyright Act, 17 U.S.C. § 111(d)(1)(B), sets forth the royalty rates that “Form 3” cable systems must pay to retransmit broadcast signals pursuant to the Section 111(c) statutory license. Form 3 systems are those with semi-annual “gross receipts” greater than \$527,600. *See id.* §§ 111(d)(1)(B), (E) & (F); 37 C.F.R. § 201.17(d). Section 801(b)(2)(C) of the Act provides:

In the event of any change in the rules and regulations of the Federal Communications Commission [“FCC”] with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

17 U.S.C. § 801(b)(2)(C). Section 804(b)(1)(B) of the Copyright Act states that, in “order to initiate proceedings under section [801(b)(2)(C)],” an interested party must file a petition with the Judges requesting a rate change within twelve months of the FCC’s action. 17 U.S.C. § 804(b)(1)(B); *see* H.R. Rep. No. 94-1476 at 178 (1976) (right to seek review “exercisable for a 12 month period following the date such changes are finally effective”).

The FCC adopted sports exclusivity rules for cable systems in 1975. *See Report and Order in Doc. No. 19417*, 54 F.C.C.2d 265 (1975) (“Sports Rules”). The FCC repealed the Sports Rules effective November 24, 2014. *See Sports Blackout Rules*, 79 Fed. Reg. 63547 (Oct. 24, 2014). At the time of the Sports Rules’ repeal, they were codified at 47 C.F.R. § 76.111 (2014). On November 23, 2015, JSC filed a rate adjustment petition pursuant to Section 801(b)(2)(C) of the Copyright Act. In their June 22 Order, the Judges established a procedural schedule for ruling on the JSC petition. While the Participating Parties were unable to settle this matter during the voluntary negotiation period established by the June 22 Order, they continued

those negotiations and have now agreed that this proceeding should be terminated with the adoption of the proposed rule set forth in Exhibit A.³

II. SCOPE OF THE PROPOSED RULE

The proposed rule would require covered cable systems to pay a separate per-telecast royalty (a Sports Surcharge) in addition to the other royalties that that cable system must pay under Section 111. The Sports Surcharge would amount to 0.025 percent of the cable system's "gross receipts" during the relevant semi-annual accounting period for the secondary transmission of each affected broadcast of a sports event, provided that all of the conditions of the proposed rule, as outlined below, are satisfied. Thus, if a covered cable system made a secondary transmission of one affected broadcast, it would pay 0.025 percent of "gross receipts" during the relevant semi-annual accounting period for that transmission; if it made secondary transmissions of two affected broadcast, it would pay 0.025 percent of "gross receipts" during the relevant semi-annual accounting period for each of those transmissions (or a total of 0.050 percent of its "gross receipts").

Section 801(b)(2)(C) of the Act states that any rate adopted in this proceeding "shall apply only to the affected television broadcast signals carried on those systems affected by the change." Furthermore, Section 801(b)(2)(C) authorizes the Judges to adjust only the royalty rates set forth in Section 111(d)(1)(B) of the Act. And Section 111(d)(3)(A) of the Act permits the distribution of royalties only to copyright owners of distant signal "non-network television

³ Neither the Judges nor any of their predecessors have previously adjusted the Section 111(d)(1)(B) royalty rates to account for changes in the FCC Sports Rules. However, the Copyright Royalty Tribunal adjusted those royalty rates in 1983 pursuant to Section 801(b)(2)(C) following the FCC's repeal of the syndicated program exclusivity rules. *See National Cable Television Association v. Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983). After the FCC adopted a new set of syndicated exclusivity rules in 1989, the CRT revised the surcharge rules to limit the circumstances in which the surcharge applies. *See Adjustment of the Syndicated Exclusivity Surcharge*, 55 Fed. Reg. 33604 (Aug. 16, 1990).

programs.” Consistent with these statutory mandates, the proposed rule limits the circumstances under which cable systems must pay the Sports Surcharge.

- **Covered Cable System.** Only a “covered cable system,” as defined in the proposed rule, would be subject to the Sports Surcharge. That definition tracks the language of the former FCC Sports Rules, which applied only to a “community unit” located in whole or in part within a defined geographic area (“specified zone”) associated with a community in which a sports event occurs. *See* 47 C.F.R. § 76.111(a) (2014). The FCC has defined a “community unit” as: “A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).” 47 C.F.R. § 76.5 (dd) (2014). And it has defined “specified zone” as an area extending 35 miles from certain “reference points” in the FCC rules. 47 C.F.R. § 76.5 (e) (2014). Consistent with Section 801(b)(2)(C) of the Act, only a covered cable system that, for purposes of the compulsory license is a “Form 3” system, *i.e.*, one whose royalties are specified by Section 111(d)(1)(B), would be subject to the Sports Surcharge.
- **Non-network Programs.** Only copyright owners of certain “non-network programs” may receive Section 111 royalties. 17 U.S.C. § 111(d)(3)(A). Accordingly, a covered cable system must pay a Sports Surcharge only for the secondary transmission of distant signal “non-network programs” within the meaning of 17 U.S.C. § 111(d)(3)(A).
- **Sports Events.** The Sports Surcharge would apply only to the carriage of eligible professional sports events and eligible collegiate sports events involving teams that are members of JSC and, in the case of eligible collegiate sports events, would be subject to a cap on the number of events involving a particular team that would be subject to the surcharge during any accounting period.
- **Gross Receipts.** The covered cable system would calculate the Sports Surcharge as a percentage of its “gross receipts” during the six-month accounting period in which the affected telecast or telecasts were carried. The term “gross receipts” has the same meaning as in 17 U.S.C. § 111(d)(1)(B). Because Section 111 royalties are distributed only to copyright owners of certain distant signal programming (17 U.S.C. § 111(d)(3)(A)), the covered cable system need not include in its gross receipts any revenues from subscribers who reside in the “local service area” of a broadcast station whose sports programming would otherwise have been subject to deletion under the former FCC Sports Rules. The term “local service area” is defined in 17 U.S.C. § 111(f)(4). The Sports Rules also exempted from their scope community units (a) with fewer than 1,000 subscribers (47 C.F.R. § 76.111(f) (2014)); (b) located outside the “specified zone” of that community unit’s local broadcast stations (*id.* § 76.111(a)); and (c) in which the affected signal was carried prior to March 31, 1972 (*id.* § 76.111(e)). Accordingly, revenues derived from subscribers in the communities served by these community units also would be excluded in determining the amount of any Sports Surcharge.

- **Notification.** The former FCC Sports Rules required the deletion of certain distant signal sports programming only when the cable system received timely advance notice from the holder of the local broadcast rights. *See* 47 C.F.R. § 76.111(b) & (c) (2014). Accordingly, a covered cable system will be required to pay the Sports Surcharge only if it receives timely notice as required by those rules. An example of a notice that the Participating Parties believe contained the requisite information is attached as Exhibit B. Finally, in the case of advance notices pertaining to eligible collegiate sports events, such notice must be accompanied by evidence confirming that the event is one to which the Sports Surcharge applies.
- **Effective Date.** The parties agree that to facilitate a smooth transition, the surcharge will take effect as of January 1, 2018.

The royalty rate reflected in the proposed rule represents a negotiated compromise based upon current market and regulatory conditions as well as various other factors and does not represent the fair market value of any secondary transmission of a sports event. None of the Participating Parties believes that the proposed rule should be considered precedential in any way for any purpose. The Participating Parties recognize that the proposed rule, if adopted, may be reconsidered in 2020 and every five years thereafter. *See* 17 U.S.C. § 804(b)(1)(B). If, for any reason, the Judges do not adopt the proposed rule, each of the Participating Parties reserves the right to demonstrate that the Judges should adopt a different rate adjustment to account for the FCC’s repeal of its Sports Rules.

III. AUTHORITY OF THE JUDGES TO ADOPT THE PROPOSED RULE

A key Congressional objective underlying the Judges’ rate-setting authority is the promotion of voluntary settlements rather than litigation. *See* H.R. Rep. No. 108-408 at 24 (2004) (referring to the legislative policy of “facilitating and encouraging settlement agreements for determining royalty rates”); *id.* at 30 (same). Consistent with that objective, Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to accept a settlement reached by “some or all of the participants” in a rate proceeding “at any time during the proceeding.” 17 U.S.C. § 801(b)(7)(A). It is firmly established that the Judges need not conduct a “full-fledged

ratesetting” before adopting a negotiated rate. H.R. Rep. No. 108-408 at 24 (2004). As the Judges have concluded:

Section 801(b)(7)(A) of the Act is clear that the Judges have the authority to adopt settlements between some or all of the participants to a proceeding *at any time* during a proceeding so long as those that would be bound by those rates and terms are given an opportunity to comment. Requiring that the adoption of all proposed settlements wait until the conclusion of the proceeding would undercut the policy in Section 801(b)(7)(A) to promote negotiated settlements.

Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2014–CRB–0001–WR (2016–2020), 80 Fed. Reg. 58201, 58203 (Sept. 28, 2015) (emphasis in original); *accord*, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2014–CRB–0001–WR (2016–2020), 80 Fed. Reg. 59588, 59589 (Oct. 2, 2015).

The Act requires that the Judges afford those who “would be bound by the terms, rates or other determination” in a settlement agreement “an opportunity to comment on the agreement.” 17 U.S.C. § 801(b)(7)(A)(i). The Judges’ rules also contemplate that the Judges will “publish the settlement in the Federal Register for notice and comment from those bound by the terms, rates, or other determination set by the agreement.” 37 C.F.R. § 351.2(b)(2). It is clear, however, that the Judges must assess the “reasonable[ness]” of a voluntarily-negotiated rate only if *participants* to a proceeding who would be bound by the rate *objected* to it. *See* 17 U.S.C. § 801(b)(7)(A)(i)-(ii) (emphases added). The Participating Parties are the only parties participating in this proceeding, and all of the Participating Parties are urging the Judges to adopt the Sports Surcharge.

CONCLUSION

For the reasons stated above, the Participating Parties respectfully request that the Judges terminate this proceeding by adopting the proposed rule set forth in Exhibit A. They further

request that the Judges suspend the procedural schedule in the June 22 Order while the Judges seek public comment on the proposed rule.

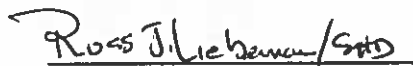
Respectfully submitted,

**NCTA-THE INTERNET &
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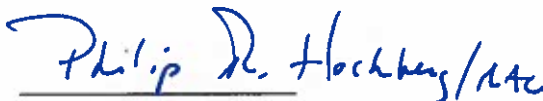


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EXHIBIT A

AMEND 37 CFR §387.2 BY RENUMBERING PARAGRAPH (e) AS PARAGRAPH (f) AND ADDING A NEW PARAGRAPH (e), AS FOLLOWS:

(e) *Sports programming surcharge*. Commencing with the first semiannual accounting period of 2018 and for each semiannual accounting period thereafter, in the case of a covered cable system filing Form SA3 as referenced in 37 C.F.R. § 201.17(d)(2)(ii) (2014), the royalty rate shall be, in addition to the amounts specified in paragraphs (a), (c) and (d) of this section, a surcharge of 0.025 percent of the covered cable system's gross receipts for the secondary transmission to subscribers of each live television broadcast of an eligible professional sports event or eligible collegiate sports event where the secondary transmission of such broadcast would have been subject to deletion under the FCC Sports Blackout Rule. For purposes of this paragraph,

- (1) The term "cable system" shall have the same meaning as in 17 U.S.C. § 111(f)(3);
- (2) a "covered cable system" (i) is a "community unit," as the comparable term is defined or interpreted in accordance with Section 76.5(dd) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 C.F.R. §76.5(dd) (2014); (ii) that is located in whole or in part within the 35-mile specified zone of a television broadcast station licensed to a community in which a sports event is taking place, provided that if there is no television broadcast station licensed to the community in which a sports event is taking place, the applicable specified zone shall be that of the television broadcast station licensed to the community with which the sports event or team is identified, or, if the event or local team is not identified with any particular community, the nearest community to which a television station is licensed; and (iii) whose royalty fee is specified by 17 U.S.C. § 111(d)(1)(B);
- (3) a "television broadcast" of a sports event must qualify as a "non-network television program" within the meaning of 17 U.S.C. § 111(d)(3)(A);
- (4) an "eligible professional sports event" is a game involving teams that are members of the National Football League, Major League Baseball, the National Hockey League, the National Basketball Association, or the Women's National Basketball Association;
- (5) an "eligible collegiate sports event" is a game involving a football or men's basketball team that is a member of Division I of the National Collegiate Athletic Association on whose behalf the FCC Sports Blackout Rule was invoked during the period from January 1, 2012 to November 23, 2014;
- (6) the term "specified zone" shall be defined as the comparable term is defined or interpreted in accordance with Section 76.5(e) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 C.F.R. § 76.5(e) (2014);
- (7) the term "gross receipts" shall have the same meaning as in 17 U.S.C. § 111(d)(1)(B) and shall include all gross receipts of the covered cable

system during the semiannual accounting period except those from the covered cable system's subscribers who reside in (i) the local service area of the primary transmitter, as defined in 17 U.S.C. § 111(f)(4); (ii) any community where the cable system has fewer than 1000 subscribers; (iii) any community located wholly outside the specified zone referenced in paragraph (e)(1) above; and (iv) any community where the primary transmitter was lawfully carried prior to March 31, 1972;

- (8) the term "FCC Sports Blackout Rule" refers to Section 76.111 of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 C.F.R. §76.111 (2014);
- (9) subject to paragraph (e)(10), the surcharge will apply to the secondary transmission of the primary transmission of a live television broadcast of a sports event only where the holder of the broadcast rights to the sports event or its agent has given the covered cable system advance written notice regarding such secondary transmission as required by the former Section 76.111(b) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 C.F.R. §§76.111(b) & (c) (2014); and
- (10) in the case of collegiate sports events (i) the holder of the broadcast rights or its agent also must attest that the specific team on whose behalf the surcharge notice is given meets the eligibility condition specified in paragraph (e)(5) above and provide documentary evidence in support thereof; and (ii) the number of events involving a specific team as to which a covered cable system must pay the surcharge will be no greater than the largest number of events as to which the Sports Blackout Rule was invoked in a particular geographic area by such team during any one of the accounting periods occurring between January 1, 2012 and November 23, 2014.

EXHIBIT B

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Pordy & Ecker, P.A.

Member, District of Columbia Bar

September 30, 2013

ADDRESSEES ON ATTACHMENT I

Dear Sir/Madam:

Subject to the provisions of Section 76.111 of the Rules of the Federal Communications Commission, a request is hereby made by counsel for the National Basketball Association for protection against the importation of certain copyrighted NBA game telecasts.

Below you will find all of the information required to be given pursuant to Section 76.111(b), including the call letters of stations which you may be carrying.

Under the regulations of the Commission, the Public Notice of September 24, 1976, and its case law (see National Basketball Association, CSC-334, issued October 9, 1985), you are duty bound to comply with Section 76.111. Moreover, pursuant to Section 504 of Title 17 of the United States Code, infringement of copyrighted programs can subject the infringer to statutory damages of from \$500 to \$20,000, with provisions for increasing these damages to up to \$100,000 for willful infringement.

Sincerely,

Philip R. Hochberg

REQUESTING PARTY:

WASHINGTON WIZARDS
601 F Street NW
Washington, DC 20004

NATIONAL BASKETBALL ASSOCIATION
645 Fifth Avenue – Olympic Tower
New York, NY 10022

<u>Date</u>	<u>Local Broadcast Time</u>	<u>Duration</u>	<u>Distant Signal</u>	<u>City of Distant Signal Origination</u>
4/5/14	7:00 PM	App. 2 ½ Hrs.	WGN	Chicago

WASHINGTON

COMCAST CORP.

(Accokeek, Alexandria, Andrews AFB, Annapolis, Anne Arundel City, Arbutus, Arlington, Arnold, Barnesville, Battery Park, Bel Alton, Beltsville, Benedict, Berwyn Hts., Bethesda, Bladensburg, Bolling AFB, Bowie, Boyds, Brandywine, Brentwood, Brookville, Bryans Rd., Bryantown, Burtonsville, Cabin John, Cantonsville, Cape St. Clair, Capitol Heights, Charles Cty., Chesapeake Beach, Cheverly, Chevy Chase, Clarksville, Clinton, College Park, Colmar Manor, Columbia, Cooksville, Cottage City, Crofton, Crownsville, Dale City, Damascus, Davidsonville, Dayton, Derwood, District Hts., Dumfries, Dunkirk, Edmonston, Elk Ridge, Ellicott City, Fairmont Hts., Forest Hts., Forestville, Ft. Belvoir AFB, Ft. Meade, Ft. Myer, Ft. Washington, Friendship Hts., Fulton, Gaithersburg, Gambrils, Garrett Park, Germantown, Gibson Island, Glen Burnie, Glen Echo, Glen Elg, Glenarden, Glenwood, Greenbelt, Hanover, Harmans, Harwood, Highland, Howard Cty., Hughesville, Huntington, Hyattsville, Indian Head, Issue, Jessup, Kensington, Lake Ridge, Landover Hills, Lanham, Lansdowne, LaPlata, Largo, Laurel, Leesburg, Linthicum Hts., Lisbon, Loudon City, Manassas, Manassas Park, Marbury, Marlton, Marriotsville, Maryland City, Millersville, Montclair, Montgomery Cty., Montpelier, Morningside, Mt. Airy, Mt. Rainier, New Carrollton, Newburg, N. Beach, North Brentwood, N. White Oak, Oakmont, Occoquan, Odenton, Olney, Owings, Oxon Hill, Pasadena, Pomfret, Poolesville, Potomac, Prince Frederick, Prince George's Cty., Prince William County, Quantico, Randallstown, Reston, Riverdale, Rock Point, Rockville, St. Charles, Savage, Seabrook, Seat Pleasant, Severn, Severna Pk., Sherwood Forrest, Silver Spring, Soldiers' Home, Somerset, S. White Oak, Sykesville, Takoma Park, Triangle, US Naval Academy, United States Naval Ordnance Station, University Park, Upper Marlboro, Waldorf, Washington, Washington Grove, West Bethesda, West Friendship, Westridge, Wheaton, White Plains, Woodbine, Woodbridge, & Woodlawn Sys.)

One Comcast Center

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VERIZON VIDEO

(FiOS Systems serving Annapolis, Anne Arundel Cty., Arlington Cty., Ashton, Barnesville, Berwyn Hts., Bladensburg, Bowie, Brentwood, Brookeville, Charles Cty., Cheverly, Chevy Chase, Clifton, College Park, Colmar Manor, Cottage City, Damascus, District Hts., Dumfries, Edmonston, Fairfax City, Fairfax Cty., Falls Church, Ft. Belvoir Army Base, Garrett Park, Germantown, Glen Echo, Glenarden, Greenbelt, Herndon, Highland Beach,

Howard Cty., Hyattsville, Kensington, Landover Hills, LaPlata, Laurel, Laytonsville, Leesburg, Loudon Cty., Manassas, Marine Corps Base (Quantico), Martin's Additions, Montgomery Cty., Morningside, N. Brentwood, New Carrollton, Olney, Poolesville, Prince George's Cty., Prince William Cty., Riverdale Park, Rockville, Sandy Springs, Seat Pleasant, Somerset, Stafford Cty, Takoma Park, University Park, Upper Marlboro, Vienna, Washington, D.C., Washington Grove.)

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